

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting historical place selection application AA-10488.

Set aside and remanded.

1. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places--National Historic Preservation Act: Generally

Sec. 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), provides the Secretary may withdraw and convey fee title to existing cemetery sites and historical places to the appropriate regional corporation. If a regional corporation files an application under sec. 14(h)(1), the Secretary may give favorable consideration to the application provided that the Secretary determines that the criteria in the regulations are met. 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity.

2. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places--National Historic Preservation Act: Generally

When the evidence of record about a potential historical place is inconclusive, but the evidence offers sufficient indications of possible sustained Native historical activity, the rejection of an application for a historical place may be set aside and the case remanded for further investigation.

APPEARANCES: Stephen F. Sorensen, Esq., Juneau, Alaska, for appellant; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management and the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Sealaska Corporation (Sealaska) has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 7, 1988, rejecting historical place application AA-10488, filed on December 12, 1975, pursuant to section 14(h)(1) of the Alaska Native Claims Settlement

Act (ANCSA), 43 U.S.C. § 1613(h)(1) (1982). In this application Sealaska selected the Jamboree Bay Village site, described in the application as a "seasonal village site [on] Baranof Island, on the northeast side of Jamboree Bay on Walker Channel," in sec. 4, T. 60 S., R. 65 E., Copper River Meridian, Alaska. 1/

A regional corporation that applies for a historical place under section 14(h)(1) "shall include as an attachment to its application * * * a statement describing the events that took place and the qualities of the site from which it derives its particular value and significance as a historical place." 43 CFR 2653.5(f). Wilsey & Ham, Inc., consultants from Seattle, Washington, had located and examined the site for Sealaska on June 22, 1975. Sealaska attached a portion of the Wilsey & Ham report to its application. The report provides the following descriptive evidence from the Wilsey & Ham field investigation:

A series of 10 notched logs (6" diameter and 10 - 12 feet long) were found either upright or fallen. There were nails in some of the logs. No house depressions or other evidence was found. What appeared to be the remains of a structure were found at the south end of the site. Many large trees have been notched - some up to a foot deep.

BLM published notice of the application in February 1978 and forwarded it to the ANCSA Projects Office of the Bureau of Indian Affairs (BIA) for field investigation, report and possible certification on April 25, 1978. Copies were also forwarded to the National Park Service and, because the lands lie in the Tongass National Forest, to the U.S. Forest Service. See 43 CFR 2635.5(h). The regulations further provide that BIA, after consultation with these agencies, "shall certify as to the existence of the site or place and that it meets the criteria in this subpart." 43 CFR 2653.5(j). If it certifies a historical place, BIA's report must "describe the events that took place and [the] qualities of the site which give it particular value and significance as a historical place." 43 CFR 2653.5(j)(2).

Personnel from BIA and from the Cooperative Park Studies Unit (CPSU), representing the National Park Service, visited the site in July 1979. BIA's Report of Investigation states in part:

Site boundaries were determined by BIA personnel, with the cooperation and agreement of the CPSU archeologists, following a transected reconnaissance of the site. [2/]

1/ Sealaska filed an amended application on Nov. 17, 1980, that added a portion of sec. 3, T. 60 S., R. 65 E., Copper River Meridian, to the legal description and increased the acreage applied for from nine to twelve.

2/ Although BIA referred to the CPSU personnel as archeologists, the CPSU itself states they were anthropologists. See BIA Report of Investigation, Exhibit 3, Appendix A; Appellant's Additional SOR and Request for Hearing, Exhibit C, pages 2 and 5.

* * * * *

The site was easily discernable [sic] from the surrounding area because of the somewhat level beach terrain, the accessible shoreline, and the presence of cabin remains, recent camp sites, and several axed trees. The site is located on the only grassy-pebble beach area in Jamboree Bay.

* * * * *

CPSU archeologists found several remains on the site. These included one structure in a complete state of ruin, located on the east side of the site. The remains consisted of logs and rough-cut timber. There were 18 trees that had been partially cut with an ax, leaving large scarred areas of various sizes on the trunks.

Three modern campsites were also located.

(Report of Investigation at 9-10 (Exh. 1, Appendix A)).

As noted, CPSU personnel accompanied and cooperated with the ANCSA Projects Office field investigators in investigating the Jamboree Bay Village site. In addition, the CPSU research staff "gathered ethnohistoric information from knowledgeable local residents and researched archival and library sources" (Report of Investigation, Exh. 3, Appendix A). The CPSU concluded that the Jamboree Bay Village site qualified for selection as a historical place under section 14(h)(1) of ANCSA (Report of Investigation, Exh. 3, Appendix B). 3/

3/ CPSU's findings and conclusions are set forth below:

"Little is known concerning the history of Jamboree Bay Village at this time. The site is situated within the traditional territory of the Sitka Tlingit and was undoubtedly used by this cultural group as a subsistence area. The structural remains reflect a traditionally constructed house, and the use of common wire nails suggests that it was built between 1890 and 1900. Ethnographically, the site is associated with trapping activities. Because of the abandonment of sites in the Southeast at the turn of this century brought about by the establishment of schools in the populated centers, Jamboree Bay Village probably only saw sporadic use during the early 1900s and was abandoned completely in the 1940s. Cultural affiliation of the modern campsites found on the site is unknown at this time; however, they may reflect use of Jamboree Bay as an overnight anchorage for trawlers.

"The significance of Jamboree Bay Village lies in its possessing enduring symbolic value to the heritage of the Tlingit population and in the information it is likely to yield important to the region's prehistory and history.

"The cultural features existing on the site represent a past lifestyle and traditional practices of the Sitka Tlingit. Because of these visual reminders, the site provides the people with a direct link to their past.

In September 1981, a BIA Claims Examiner prepared a report based on "data supplied by field investigators, archaeologists, field notes, and research" (Certificate of Claims Examiner, Sept. 30, 1981). The findings of fact portion of this report noted that Sealaska's statement of significance submitted in accordance with 43 CFR 2653.5(f) "did not give any information to support a Tlingit village, whether it was permanent or seasonal, existed within this site" (Claims Examiner's Report at 1). The report found that the site contained ax-scarred trees and one structural remains, nailed together. For his finding that "[t]here is no history of Jamboree Bay Village" the Claims Examiner referred to the CPSU report. Id. at 4. He noted that the CPSU recommended the site for certification as a historical place but concluded:

27. Based upon field examination, research of records and CPSU report, BIA has determined that Jamboree Bay Village Site is Ineligible for Certification as a historical place.

28. Based upon the lack of evidence to support any historical or traditional cultural events associated with sustained historical Native activity, BIA has determined that this site did not meet the definition for a historical place per 43 CFR 2653.0-5(b).

Id. The report recommended that BIA issue a certificate of ineligibility for the site as a historical place. Id. at 5.

On November 18, 1981, the Forest Service filed a letter with the ANCSA Projects Office stating: "We concur with the BIA analysis and report for this site and agree that the site does not qualify for selection under Section 14(h)(1) of ANCSA."

On August 11, 1982, the Acting Area Director, BIA, issued a certificate of ineligibility for the Jamboree Bay Village site, listing the following reasons:

1. The site is not associated with Native historical events that have made a significant impact in prehistory or history of Tlingit people.
2. The site is not a tract of land upon which occurred a [sic] significant Native historical events associated with sustained Native historical activities.

fn. 3 (continued)

"Little is known concerning Native activity and land use in the southern portion of Baranof Island. Jamboree Bay Village could yield significant archeological information leading to a better understanding of the prehistory and history of this region.

"Because Jamboree Bay Village has significance as defined by the Rules and Regulations, it qualifies as a historic site and we recommend that it be conveyed to Sealaska Corporation as a 14(h)(1) site." (Report of Investigation at 37-38 (Exh. 3, Appendix B)).

3. The site did not yield any physical remains of a permanent village.
4. History does not support as to whether the site was a permanent or seasonal Tlingit village.

BIA forwarded its report on the application to BLM in August 1982. See 43 CFR 2653.5(k). In August 1986, BLM wrote Sealaska stating that it had been "in communication with [Sealaska's] staff during the last three years about either relinquishing or having [the] corporation choose certain selection applications for us to reject as test cases to be appealed." BLM requested Sealaska to relinquish the applications, including the application for the Jamboree Bay Village site, or it "would proceed with rejection decisions, which * * * would give you the opportunity to appeal each decision to the Interior Board of Land Appeals."

In response, on July 27, 1987, Sealaska submitted to BLM a study prepared by Rosita Worl and Charles W. Smythe, Ph.D., of the Chilkat Institute entitled "Assessment of Twelve Sealaska Corporation Historical Site Applications Under the Alaska Native Claims Settlement Act 14(h)(1)" (Chilkat Assessment). The purpose of this study was to present new information to demonstrate that BIA's certificates of ineligibility pertaining to 12 selection applications, including the application for the Jamboree Bay Village site, were based upon inadequate investigations and incomplete information. The Chilkat Assessment presented the Institute's view of shortcomings in the decision process that led to determinations that the sites were ineligible. In general, these were "poor field procedures and * * * disregard for the rudimentary findings that were obtained"; "inadequate analyses of surface and sub-surface findings"; "oral history was ignored or considered insufficient"; and a bias against seasonal sites (Chilkat Assessment at 1-7).

In the case of the Jamboree Bay Village site, the Chilkat Assessment stated that "this site is directly associated with the period in which the Sitka Tlingit made a large part of their living from winter trapping," adding:

The survey results demonstrate the site has prehistoric significance and is associated with sustained Native historical activities. Also, the potential for further information about use and occupancy of this site, based on a more complete archeological survey, is very high. There is a need to develop oral history about the site, which was not performed during BIA's survey.

(Chilkat Assessment at 57). The assessment states the scarred trees at the site are "representative of traditional pitch-collecting activity characteristic of the prehistoric period * * * the cuts may also represent the collection of cedar bark for cultural uses." Id. at 59. It states that the fact that the initial layer of the test pit dug by CPSU near the traditional structure contained the remains of a butchered bone "suggest[s] that habitation may have extended back as far as 1800." Id. The assessment concludes:

These results are extremely suggestive of older, probably prehistoric use of the site by smaller family groups. The presence of salmon streams at the site supports this conclusion. The BIA report does not evaluate the potential for older habitation, and in fact the suggestion was only discovered in the field notes of the CPSU archaeologist. We are concerned that there may be more evidence which was not examined adequately. In any case, the evidence presented here requires a more complete investigation.

Id.

BLM sent the Chilkat Assessment to the BIA ANCSA Projects Office and requested it to "review this new information and let us know * * * if the status of any of the sites will change." BIA responded that one site should be reinvestigated, four should be declared eligible based on the new material submitted, and seven, including the Jamboree Bay Village site, did not qualify for either reinvestigation or reversal of the certificate of ineligibility. Accordingly, by decision dated March 7, 1988, BLM rejected Sealaska's application for this site, iterating the reasons given in BIA's certificate of ineligibility, and Sealaska appealed.

In its statement of reasons (SOR), Sealaska argues that Departmental regulations at 43 CFR 2653.5 establish a "presumption of validity for any Section 14(h)(1) application," and that an "application is to be given 'favorable consideration' if the site qualifies" (SOR at 6-7). Sealaska contends that BIA is required to perform a "complete, thorough and competent investigation of the proposed historic site" but failed to do so. Id. at 8-9. Sealaska attached an earlier draft of the evaluation of the Jamboree Bay Village site contained in the Chilkat Assessment. Sealaska points out that CPSU nominated the Jamboree Bay Village site for placement on the National Register of Historic Places (NRHP) and argues that "[t]he criteria for nomination and placement on the [NRHP] is [sic] as extensive, if not more so, as the criteria used by the BIA for determination of eligibility and validity." Id. at 10. Sealaska argues that BIA should have conducted a more extensive investigation of the Jamboree Bay Village site to determine whether the site was used only seasonally or throughout the year. Id. at 11. Sealaska requests that we grant its application or remand the matter to BLM and BIA with instructions that BIA conduct a "proper, competent and thorough review and investigation of this site." Id. at 12.

BIA and BLM answer that there is neither a "presumption of validity" for a 14(h)(1) application nor a requirement that every application be given "favorable consideration" (Answer at 7-8). In the agencies' view, under 43 CFR 2653.5(a) "favorable consideration cannot be given unless the Secretary finds that the regulatory criteria is [sic] met." Id. at 8. The agencies state that "[t]he Secretary cannot give favorable consideration to applications which are not eligible, 43 CFR 2653.5(a)" (id., quoting BLM Decision at 2). The agencies argue that Sealaska has not met its burden of proving BLM's decision that this site did not meet the criteria was in error, and BLM's decision should be affirmed. Id.

[1] Section 14(h)(1) of ANCSA, 43 U.S.C. § 1613(h)(1) (1988), provides "[t]he Secretary may withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places." The Department has defined "historical place" in 43 CFR 2653.0-5(b) as

a distinguishable tract of land or area upon which occurred a significant Native historical event, which is importantly associated with Native historical or cultural events or persons, or which was subject to sustained historical Native activity, but sustained Native historical activity shall not include hunting, fishing, berry-picking, wood gathering, or reindeer husbandry. However, such uses may be considered in the evaluation of the sustained Native historical activity associated with the tract or area.

The last sentence of this definition was added when the Department amended the regulations in 43 CFR Subpart 2653 in 1976. In publishing the final regulation, the Department commented: "The proposed amendment is modified to allow such subsistence uses to be considered in evaluating the sustained Native historical activity involved." 4/

An application is not entitled to a presumption of validity and may be given favorable consideration only if it meets the criteria in the regulations. The language of section 14(h)(1), supra, and of 43 CFR 2653.5(a) makes clear that the Secretary has discretion to convey land to a regional corporation for a cemetery site or a historical place if the criteria are met. If a regional corporation files an application under section 14(h)(1), "[t]he Secretary may give favorable consideration to [the application] Provided, That the Secretary determines that the criteria in these regulations are met." 43 CFR 2653.5(a). For a historical place, this means that it must be a distinguishable tract of land or area where a significant Native historical event occurred or which was subject to sustained Native historical activity, as stated in the definition of "historical place" above. 5/

4/ 41 FR 14735 (Apr. 7, 1976). The proposed amendment read:

"However, subsistence activity will not disqualify a historical place from consideration if qualifying primary historical or cultural values can be shown to be associated with the place. A historical place may consist of the structural remains of past activity or distinctive natural features associated with historical events, persons, or sustained activities; it will include, however, only the acreage which is essential for the preservation of primary historic features." 40 FR 57364 (Dec. 9, 1975).

"This language * * * was the subject of extensive comments with the principal point being that the change seemed to confuse rather than clarify anything." 41 FR 14735 (April 7, 1976).

5/ BIA and BLM note:

"The important elements of this definition are that there must be 'a distinguishable tract of land or area' plus either a 'significant Native historical event, which is importantly associated with Native historical or cultural events or persons' or 'sustained historical Native activity' [emphasis in original]. If a site cannot meet the threshold requirement

In evaluating a tract or area to determine whether a significant Native historical event occurred which is importantly associated with Native historical or cultural events or persons, 43 CFR 2653.5(d) provides that the quality of significance in Native history or culture

shall be considered to be present in places that possess integrity of location, design, setting, materials, workmanship, feeling and association, and:

(1) That are associated with events that have made a significant contribution to the history of Alaskan Indians, Eskimos or Aleuts, or

(2) That are associated with the lives of persons significant in the past of Alaskan Indians, Eskimos or Aleuts, or

(3) That possess outstanding and demonstrably enduring symbolic value in the traditions and cultural beliefs and practices of Alaskan Indians, Eskimos or Aleuts, or

(4) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or

(5) That have yielded, or are demonstrably likely to yield information important in prehistory or history.

BLM refers to these as the "preliminary criteria" and five alternative requirements for a historical place that is associated with Native historical or cultural events or persons (Answer of BIA and BLM at 4-5). See United States Forest Service, 101 IBLA 38, 43 (1988).

This case, however, deals with an application for tract which may have been subject to sustained Native historical activity rather than for one associated with Native historical or cultural events or persons.

In related cases we have held that the appellant bears the burden of showing by a preponderance of the evidence that BLM's decision rejecting an application under section 14(h)(1) was in error. Sealaska Corp., 115 IBLA 249 (1990); Sealaska Corp., 115 IBLA 257 (1990). In this case, however, the CPSU reports supplement BIA's findings upon which BLM based its decision. Our review of the record gives us concern that BIA's conclusion may be based on an inadequate investigation.

The February 1980 report of the CPSU anthropologists who accompanied the BIA field investigation team states the ax-scarred trees reflect traditional pitch-collecting activities; the structural remains reflect a

fn. 5 (continued)

and fit into one of the alternative provisions of this definition, it cannot be a 14(h)(1) historical place." (Answer of the BIA and BLM at 5).

traditionally constructed house; and the common wire nails suggest the house was built between 1890 and 1900. 6/ The CPSU site survey form describes the type of site as "Archeological - Precontact" and "Archeological - Postcontact" and defines it as a village. The form shows that a subsurface test by the test pit method was conducted. The site is evaluated as Tlingit (Sitka) and gives a time placement from 1800-1950 based on cultural evidence. The cover letter for the CPSU report states that "[m]ore in-depth information about the site and its significance appears in the National Register nomination form on file with this office, the Bureau of Indian Affairs, the State Historic Preservation Officer's Office, and the appropriate Native Corporations." 7/

The CPSU anthropologist's nomination form for the National Register of Historic Place Inventory, prepared in March 1980, adds that both milled lumber and logs were used in construction of the house and cast iron stove parts were associated with it. It states that bone fragments were recovered through subsurface archeological testing. It characterizes the use of common wire nails as non-traditional. Its statement of significance relates:

Jamboree Bay Village is significant because it possesses enduring symbolic value in the traditions of the Tlingit people; because it is likely to yield important information on the prehistory and history of the Tlingit and southeast Alaska; and because it possesses integrity of location, design, setting, and feeling and association.

Jamboree Bay Village is situated within the traditional territory of the Sitka Tlingit who used it as a settlement site and subsistence area. * * *

* * * * *

Compared to many other Tlingit village sites, there is less, specific information on Jamboree Bay. Nevertheless, the people are aware of the site's existence and the area's traditional use. The site represents a traditional lifestyle and practices that provide the Native population with a direct link to their past. Thus, Jamboree Bay Village possesses symbolic value for Tlingit heritage.

Little is recorded concerning Native activity and land use in the southern portion of Baranof Island. Both the history and prehistory of the area are virtually unknown. Archeological

6/ See note 3, *supra*.

7/ Although this form was completed by CPSU (see Appellant's Additional SOR and Request for Hearing, Exhibit C) and may be "on file," it is not clear that it was submitted to the State Historic Preservation Officer for review, "a necessary step before an agency * * * submits properties to the National Register." See Answer of BIA and BLM, Exh. 1.

research will thus play a major role in gaining information on the area's past. Archaeological testing at Jamboree Bay revealed subsurface cultural material and features associated with Native use of the area. Excavation at Jamboree Bay could tell us much about economic and community patterns on southern Baranof Island at the turn of the century and perhaps earlier.

Jamboree Bay Village maintains its integrity of location, design, setting, and feeling and association. Although there are modern campsites on the site, they have had little effect on the site's features and represent only temporary intrusions. Significantly, the site's archeological record appears to be undisturbed. The traditional activities and visible remains associated with the site evoke important feelings and associations [sic] for the Sitka Tlingit and affirm their historic relationship to Jamboree Bay Village.

(Additional SOR, Exh. C, at 4).

As noted above, the Chilkat Assessment adds that the CPSU field notes show that the bone fragment obtained from the subsurface test pit may indicate habitation as early as 1800.

There is no dispute that Sealaska has identified a distinguishable tract of land, as required for a historical place. BIA's Claims Examiner confused the two kinds of historical places when he found a "lack of evidence to support any historical or traditional cultural events associated with sustained Native historical activity," a finding adopted as a reason for BIA's certificate of ineligibility upon which BLM based its decision. This same confusion is evident in another of the reasons for the certificate, *i.e.*, that the "site is not associated with Native historical events that have made a significant impact in prehistory or history of Tlingit people." As related above, a tract may be a historical place if it was subject to sustained Native historical activity, even if no significant Native historical event occurred there.

Two other reasons were offered for BIA's certificate and incorporated in BLM's decision -- that the site "did not yield any physical remains of a permanent village" and that history "does not support as to whether the site was a permanent or seasonal Tlingit village." In their answer, BIA and BLM argue that the site does not satisfy the definition of a historical place because "the only Native activities identified are the types of everyday uses which are not by themselves sufficient for finding the requisite 'sustained historical Native activity'" (BIA and BLM Answer at 12). The agencies argue that trapping, pitch collecting and bark gathering are akin to the types of activities that do not themselves qualify a site as an historical place under the definition. "These activities do not make a site ineligible but there has to be some more significant activity to differentiate the claimed site from the rest of the State of Alaska where the same general uses occurred." *Id.* at 13-14.

[2] In our view the evidence about this site is inconclusive, but the evidence offers sufficient indications of possible sustained Native historical activity that we believe the site should be studied further before its potential historical resources are left unprotected. There is a reasonable basis to believe that additional physical evidence -- and evaluation of it -- as well as oral testimony may establish whether or not sustained Native historical activities took place at the Jamboree Bay Village site and, if so, what they were. The CPSU March 1980 report states that the site "is likely to yield important information on the prehistory and history of the Tlingit and southeast Alaska." The Chilkat Assessment recommends a more complete investigation and an evaluation of the potential for older habitation. There is no provision in the statute or regulations that a historical place must have been "permanent" or that sustained seasonal subsistence living may not qualify as sustained Native historical activity. As noted above, in evaluating whether a tract or area was subject to sustained Native historical activity, subsistence uses such as hunting, fishing, berry-picking, wood gathering, or reindeer husbandry may be considered, where associated with other uses of the tract or area.

We therefore set aside BLM's March 7, 1988, decision and remand this matter for further investigation and a determination whether the Jamboree Bay Village site qualifies as a historical place. 8/ In light of this disposition of the appeal, Sealaska's request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded.

Will A. Irwin
Administrative Judge

I concur:

James L. Burski
Administrative Judge

8/ Further investigation could also include more analysis of whether or not the site is "demonstrably likely to yield information important in prehistory or history." See 43 CFR 2653.5(b)(5).